



ADVISORY

(VAPOR RECOVERY REGULATION)

Number 1

Date: June 25, 1984

Vapor Recovery Requirements for Gasoline Delivery Tanks

THE PURPOSE OF THIS ADVISORY IS TO:

1. Help control gasoline truck hydrocarbon emissions which are a major contributor to photochemical smog.
2. Help you understand the vapor recovery certification requirements for gasoline delivery trucks.
3. Prevent misunderstandings resulting in preventable violations and fines.

State law requires that vapor recovery systems for gasoline delivery trucks be certified on an annual basis. To be certified, the cargo tank must pass a leak rate test approved by the CHP. The requirements during the rest of the year are:

1. A CHP issued decal shall be affixed to the cargo tank in a prominent location in accordance with CHP regulations.
2. A copy of the cargo tank vapor recovery system certification signed by the CHP must be retained with the tank vehicle.
3. The cargo tank must be maintained so that it can meet the year-round leak-rate at any time during the year.

Violations of any portion of the regulation are subject to a penalty of up to \$1,000 for each day the violation occurs. The Air Resources Board staff conducts inspections at bulk terminals to determine compliance with cargo tank vapor recovery requirements. A Notice of Violation will be issued when non-compliance is discovered.

For answers to your questions, call the Air Resources Board Compliance Division at (800) 952-5588 or (916) 322-SMOG. If no one answers, please leave a message on our recorder.

California Air Resources Board
Compliance Division
PO Box 2815
Sacramento, CA 95812



CALIFORNIA AIR BASINS

(AS THEY PERTAIN TO THE RVP REGULATION)



Note: The boundary between the South Central Coast Air Basin and the South Coast Air Basin is as defined on January 1, 1976. All other boundaries are as currently defined.

SB163 Analysis
as passed by the Senate and Assembly during 9/95

Section 1: Repeals HSC Section 43021

Section 2: Adds HSC Section 43021, a significantly modified version of the prior Section 43021

Paragraphs (a) through (c) are not changed

(d) This paragraph contains the requirement that motor vehicle fuel distributors (MVFDs) maintain the delivery records that allow us to trace noncomplying fuel up and down the distribution chain, identify illegal blending, and determine which party in the distribution chain has liability for the violation. The original version requires that distributors keep copies of the bill of lading showing the source and nature of the fuel, the delivery ticket completed by the carrier showing the destination of the fuel, and the invoice showing the seller and purchaser of the fuel. This language has been modified to allow MVFDs to keep *the information contained in these documents* instead of the documents themselves and specifies that *the information can be kept electronically*.

Keeping the information electronically implies that the data on the document in question can be transferred to some kind of a database in a computer owned or operated by the MVFD. The bill does not specify that ALL data from the document must be kept, and it is unlikely that all of the pieces of information used to develop a case will be kept. Further, there are no requirements regarding format, software types, etc. that would ensure the data kept is understandable and usable.

Electronic information is highly vulnerable to modification. Without copies of the source documents, we would have no way of verifying that the electronic information is accurate. Criminals could enter whatever data suited their purposes, and even if we could somehow identify that the data were false, we would have no documentary evidence with which to prove it in court.

Retrieve and duplication of the electronic information may be problematic, as ARB field staff are not expert in the computer sciences. An uncooperative or deceptive MVFD can claim that their computer staff are not available, that their computer system or some part of is not functioning, that the data was accidentally erased, etc., in order to withhold information without appearing uncooperative. We would have no recourse, and would be unable to prove intention, willfulness, fraud, negligence, etc. and would not have the information or documentary evidence needed to show liability for the violation.

Permission to keep these records electronically renders the requirement useless in the case of any criminal distributor with a computer. Since this program was created specifically to deal with the criminal element in the petroleum marketing and distribution industry, specifically designed to not be burdensome to legitimate distributors, it is absurd to provide the criminals with a prescription for evasion.

fuel sale The prior wording "...a copy of the delivery ticket or receipt showing the final destination of the fuel has been changed to "the delivery ticket or receipt showing the location of the fuel at the time of

I cannot fathom the reason for this change, as the location of the fuel at the time of a violating sale is not usually in question; if the violation is found at a refinery or bulk terminal, that is the location of the violating sale. If the violation is discovered via sampling at a retail outlet, the retailer's facility is the known location of the violating sale. However, if the violation has been

caused by a distributor who misrepresented an illegal fuel as a legal one, or who altered or extended a legal fuel before delivery, or the violation has been discovered through auditing a MVFD, the final destination may not be evident. The final destination of the fuel is critical, as many of the fuel specifications regulations have differing requirements based on the geographical location of the retail outlet where the fuel is dispensed to motor vehicles. Also of consideration is whether the final destination is a location at which the fuel can be further altered or blended. Furthermore, other information on the delivery tickets, such as which tanks receive which volumes of fuel, the time of the delivery, the stick readings showing tank levels at the time of the delivery, etc. are also crucial to understanding and documenting violations. If this new wording is interpreted by MVFDs to imply that only the location of the fuel at the time of the sale is significant, and that is all that is saved electronically, a critically important tool in proving our cases will have been lost.

- (f) Includes the wording as well as any penalties prescribed by Section 41963."

There is no Section 41963, so this wording, which was removed in earlier versions of the bill, should not have been returned.

- (J) Specifies that the section shall become operative January 1, 1999.

This is a very curious construction. Section 3, analyzed below, contains parallel paragraphs denoted as HSC Section 43026 of a new Chapter 1.5, as well as new penalty provisions. Chapter 1.5 is scheduled to expire on January 1, 1999, unless extended. I can only assume that the intent is to keep the modifications to the MVFD program in the event that Chapter 1.5 is repealed.

Section 3: Adds Chapter 1.5 to HSC Part 5, Division 26, including HSC Sections

43025 Essentially meaningless intent language

43026 Contains the MVFD program created in Section 43021 analyzed above, effective between implementation of this bill and January 1, 1999. The same problems outlined above exist in this version of the Section as well.

43027 Sets forth a graduated penalty structure for fuels-related violations in four subparagraphs

- (a) Sets a maximum penalty of \$250,000 per day for willful and intentional violation of the fuels regulations, plus an additional penalty for economic gain.

It is almost impossible to prove willfulness and intent, and in those rare cases where they might be demonstrable criminal prosecution is far more likely to be pursued, so this provision is essentially unenforceable.

The language describing the additional economic gain penalty is unwieldy and almost incomprehensible because of double negatives.

- (b) Sets a maximum penalty of \$50,000 per day for negligent violation of the fuels regulations.
- (c) Sets a maximum penalty of \$35,000 per day for any violation of the fuels regulations, with the exception of recordkeeping requirements. This is the strict liability provision.
- (d) Sets a maximum penalty of \$25,000 per day for falsification in or failure to keep documents required to be kept by law. Further, it requires that the specific circumstances and the intent of the defendant be considered in assessing penalties for these recordkeeping violations.

Most documents that constitute evidence of a violation of fuels regulations are normal business records typical of the petroleum marketing and distribution industry, and they are not required to be kept by law. Document falsification is very difficult to prove -- investigators would either have to locate and seize two sets of books or to convince the violator to confess to a crime or testify against his/her employer. Proofs of this kind are beyond the scope of authority of ARB investigators. Therefore, this provision is either meaningless or unenforceable in most cases.

The delivery records required to be kept by motor vehicle fuels distributors pursuant to HSC 43021 are a notable exception to the above statement. However, the penalties for failure to keep records pursuant to this program are included in HSC 43021 (or 43026 if this bill is passed) and are considerably lower. Of course if they are kept electronically, falsification will be impossible to prove.

The only other records required to be kept in connection with fuels specifications are monthly volumes of gasoline throughput and deposit control additive usage; no special penalties are needed for this requirement, as failure to keep detailed records tends to increase the volume of noncomplying gasoline and therefore the penalties for failure to additize properly.

The provision requiring consideration of circumstances and intent is so unenforceable as to be laughable. There are two types of violators of fuels regulations -- those who would like to comply with the law but fail to do so because of ignorance or carelessness, and those who deliberately and knowingly violate the law for some kind of gain or advantage. The former will claim, perhaps honestly, that they forgot to keep the records, or they lost them, or they didn't understand the regulation. The criminal violators will make the same claims, because they are dishonest by definition and wish to conceal their criminal activities. Since we do not have any mind readers on staff, there is no way to assess intent, much less to prove it.

43028 Gives the Board authority to adopt procedures for assessing administrative penalties in lieu of pursuing civil penalties via litigation. These administrative penalties would be limited to \$25,000 per day, with a total not greater than \$300,000. The last sentence specifically provides that settlements in lieu of litigation can be negotiated under other penalty provisions (presumably the provisions of HSC 43027), except that the state board shall not rely on any provision of the Business and Professions Code.

The nature of potential administrative penalty procedures and fines, and the difficulty of promulgating such regulations, is beyond the scope of this analysis. Assuming that effective procedures could be developed and implemented, including a penalty schedule with sufficient deterrent values, this could be a useful tool for adjudicating minor strict liability cases, and does not appear to preclude pursuit of greater penalties at the Board's discretion.

The reference to the Business and Professions Code here is curious. The language restricts the Board from "relying" on it in settlement negotiations, but is silent on the issue of pursuing civil penalties for these violations. Presumably the BPC penalties could still be referenced in Reports of Violation, could not be discussed in connection with settlement in lieu of litigation, but could still be included in a civil complaint if a case cannot be settled. Since negotiating posture tends to be only as strong as the potential court case, this is strangely contradictory.

43029 Provides for additional penalties to be determined by factors based on "the number of tons of incremental increased vehicular emissions resulting from the manufacture, distribution, and sale of the specified volume of noncompliant fuel..." to be multiplied by a dollar amount which differs for gasoline and diesel, but which is labeled the "maximum calculated cost-effectiveness" of the respective fuel.

The language of this Section is so complicated as to be almost incomprehensible, and almost none of the critical terms are defined. The term "incremental increased vehicular emissions" should be defined.

This version of the bill is an improvement over the last version I analyzed, in that specific dollar amounts are given in paragraphs (a) and (b) as multipliers for gasoline and diesel violations respectively. However, they are to be multiplied by the aforementioned "number of tons of incremental increased vehicular emissions".

(c)(1) Provides for the values set forth in (a) and (b) above to be adjusted

The means of adjustment is not expressed clearly, nor is the schedule of adjustments and who is to calculate them specified.

(c)(2) States that the methodologies used to calculate the excess emissions shall be reviewed and updated by the ARB as necessary.

These methodologies are not identified by delineation nor by reference. In the absence of a set of formulas linking vehicular emissions to particular fuels specifications which factor in degree of difference from the maximum or minimum standard, there will be very few cases in which these penalties can be assessed, as calculating even volumes of noncomplying fuel sold is often very difficult given the type of documentation now available, and there will be even less available if this bill is signed. The requirement to prove actual excess emissions in most cases will render these penalties uncollectible. If such a set of formulas does exist, it should be included in the legislation so there can be no later argument about how the additional penalties are to be calculated.

43030 Provides that for the penalties prescribed in Sections 43027 and 43028, each day in which a violation occurs is a separate offense, and precludes civil and criminal prosecution for the same offense.

43031 Specifies factors to be considered in determining a settlement amount; they are factors already considered by the Compliance Division by policy.

43031.5 Specifies that penalties recovered shall be deposited in the Air Pollution Control Fund and shall only be expended for environmental cleanup, abatement, or pollution prevention technology.

This may limit disposition of the penalties unnecessarily; on the other hand, it might protect portions of the ARB budget from reallocation to other agencies or funds. An economic and/or political analysis of the ramifications of this provision is beyond my expertise.

If narrowly interpreted, this may preclude alternative settlements such as environmental tradeoff projects and scholarship endowments, since penalties paid in these ways cannot be deposited in the APC Fund. This language should be amended to replace the term "penalties" with the term "cash penalties".

43032 Requires a report to several governmental committee on violations, settlements, rate of compliance with requirements that are subject to this chapter.

The intent of this provision is not clear to me, as most of the requirements are upon government, and developing a rate of compliance with them would consist of listing the cases settled during the period in question and affirming that we followed the regulations in each case or stating that we did not in some of them. Listing the violations and settlements would not be a problem.

General Discussion

The net effect of implementing the type of penalty structure outlined in this bill would be detrimental to the ARB's enforcement program in several ways:

Tying penalties to days in violation rather than to volumes of noncomplying fuel will in most cases reduce penalties considerably, which is undoubtedly why industry is proposing this legislation. Large refineries and bulk terminals can put hundreds of thousands of gallons of noncomplying fuel into the marketplace in just a day or two. Also, with our very limited staff of just four investigators for the entire state, it is very difficult to document violations on a day by day basis, as violators can argue that a sample was representative of the fuel sold on the day the sample was taken only. Observing and documenting vehicle sales during every day of violation for criminal violators would require a much larger staff.

Assuming that a recordkeeping violation pursuant to the proposed HSC 43027(d) can be documented, it would be difficult to prove on which days or on how many such violations occurred. If a record is falsified, is there a violation on every day in which the falsified record is not corrected?

The maximum penalties for violations under the proposed structure would be smaller than the actual negotiated settlements being collected under the current structure. As previously discussed, the \$250,000/day penalty for willful and intentional violations will not apply to most cases, leaving a maximum penalty of \$50,000 a day for a few cases in which negligence can be proven, and \$35,000 a day for the strict liability violations that make up most of the ARB's cases.

The proposed structure, which provides a lesser penalty for recordkeeping violations, is a general disincentive for keeping the documentation that our enforcement relied upon to prove violations. Large companies and criminal companies could very well decide that is more economical to take a relatively small recordkeeping penalty and just claim not to have the records than to help us document additional days of violation.

Almost all of the ARB's cases are resolved through the mutual settlement program, largely because the difference between our settlement offers and the potential penalties under the current structure is so large. While nothing in the proposed legislation specifically prohibits or inhibits this process, the negotiation posture is only as strong as the potential case, which is as strong as the evidence plus the size of the potential penalties and the cost of litigation. The modifications to the recordkeeping requirements of the MVFD program will seriously compromise our ability to obtain evidence of violations and/or liability for them, while the proposed penalty structure will greatly reduce the potential penalties, and thus reduce the exposure for a company refusing settlement in favor of litigation. If the cost of litigation is not much greater than the cost of settlement, far more companies will choose that option. The Attorney General's office is the entity responsible for prosecuting civil cases for the ARB, and that office has not pursued a case to conclusion for us since the early 1980's. Several strong cases against criminal violators have been dismissed as a result of the AG's failure to pursue them. It will only take a couple of these failed cases in this industry to send the message that it is more profitable to allow us to attempt litigation and fail than to take settlement negotiations seriously.

Should there be a change in attitude on the part of the Attorney General's office, leading to a commitment to pursuing our cases, a problem will still exist. A great deal more staff time and expertise are required to successfully prosecute a court case, and neither the Compliance Division nor the Office of Legal Affairs is adequately staffed to convert from negotiated settlement to litigation as the customary method of resolving cases.

Recommendation

Vigorously request that the Governor veto this bill, as the impacts on our enforcement programs will be massively destructive.

TechNotes

California State Fire Marshal
Technical Services Division

#92-004



Potential Problem with Hold-Open Latches on Fuel Dispensers

Section 41960.6 was recently added to the California Health and Safety Code requiring that all gasoline and diesel fuel pumps be provided with an operating hold-open latch after July 1, 1992. A hold-open latch is defined as "any device which is an integral part of the nozzle and is manufactured specifically for the purpose of dispensing fuel without requiring the consumer's physical contact with the nozzle". Of special interest to fire officials is subdivision (d) which states:

(d) Nothing in this section shall affect the current authority of any local fire marshal to establish and maintain fire safety provisions for his or her jurisdiction.

The California State Fire Marshal has received unconfirmed reports that hold-open latches are, under some circumstances, responsible for accidental discharge of flammable liquids. Reportedly, this problem is occurring with the use of hold-open latches on nozzle not equipped with insertion interlocks. There are indications that nozzles equipped with an interlock system can also cause accidental discharges if there is a malfunction within the interlock mechanism.

Reports indicate that accidental discharges are occurring at service stations utilizing a PRE-PAY mode of operation. Hold-open latches may be a hazard in this type of operation if a nozzle is returned to the dispenser with the hold-open latch set. When the dispenser is turned on for the next customer, gasoline or diesel fuel may be discharged since the nozzle lever is held in the open position by the latching device.

The California State Fire Marshal has not received reports of any injuries or fires occurring from these accidental discharges. It is emphasized that this bulletin has been issued for information only. The decision to permit or prohibit the use of hold-open latches is at the discretion of local fire authorities.

Questions regarding this issue may be directed to Deputy Don Masters, Vapor Recovery Program Coordinator, by telephoning (916) 427-4563.